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No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION: CONCESSIONS BY THE GOVERNMENT

The government makes three significant concessions. First, the government concedes that it may be required to stipulate to a defendant's status as a felon in a § 922(g)(1) case: "Consistent with those principles, where a defendant offers an unconditional stipulation, coupled with an adequate proposed jury charge, the trial court should consider the availability of the stipulation as one of the many factors in the Rule 403 balancing process." Brief for the United States at 28. The government agrees that Petitioner Old Chief made an "unconditional" stipulation. *Id.* at 29. Although the government now argues that Old Chief's proposed jury instruction was "inadequate," the government never advanced this argument in the lower courts, particularly in the district court when defense counsel would have been more than happy to revise the jury instruction to take into account the government's concerns.

Second, the government agrees that Old Chief's prior assault conviction created the danger of unfair prejudice: "Admission of evidence of the prior assault conviction presented the potential that the jury might improperly surmise that, having committed an assault in the past, petitioner was more likely to have done so again." Brief for the United States at 30. Despite this concession, and like the trial court, the government failed to employ the Rule 403 balancing process. Contrary to the government's contention, the trial court *never held* "that the potential for unfair prejudice from the introduction of petitioner's

prior judgment did not substantially outweigh the probative value of that evidence." *Id.* at 29-30. The trial court simply ruled that "[i]f he [the prosecutor] doesn't want to stipulate, he doesn't have to." J.A. at 16. At a minimum, the trial court should have engaged in a 403 balancing. By failing to engage in a balancing test, the trial court abused its discretion. Despite its best efforts, the government has failed to establish that the nature of Old Chief's prior felony conviction was "highly probative evidence," or even probative at all, in comparison to its prejudicial effect.

Third, although it criticizes Old Chief's proposed jury instructions and even contends that defense counsel "invited error", the government admits that "[t]he instructions at issue [concerning Rules 404(b) and 609] were largely inapplicable because petitioner did not testify at trial, and because evidence of his prior offense was not introduced under Rule 404." Brief for the United States at 31-32. If jurors are assumed to follow their instructions (*Shannon v. United States, id.* at 32), the jury had to be confused because they were not properly and carefully instructed. Defense counsel was not given the opportunity to object to the trial court's instructions until *after* they were read to the jury. If the stipulation requested by Old Chief had been accepted by the government, there would have been no confusion at all. Having rejected the stipulation and insisted that the jury hear about the prior assault conviction, the government cannot now complain of hypothetical juror confusion. The government cannot rectify the trial court's abuse of discretion.

II. ARGUMENT

A. Evidence of the Nature of the Prior Felony Conviction is Immaterial and, thus, Inadmissible in a Felon in Possession of a Firearm Case

In defining "relevant evidence," Fed. R. Evid. 401 contains two separate elements. The government's assertion that "information about the nature of petitioner's prior offense was * * * relevant to show that he was previously convicted of a covered crime" (Brief for the United States at 11) misconstrues the meaning of relevant evidence because the government ignores the materiality prong of the definition of relevancy. Rule 401 codifies in a single standard the two separate relevancy requirements of probative worth and materiality. *See* 1 Louisell and Mueller, *Federal Evidence* (1st ed. 1977) § 95 pp. 672-673. The name and nature of a prior conviction do not show anything about whether the prior conviction was punishable by a term of imprisonment exceeding one year. The specific name and nature of the prior offense are therefore immaterial to the issue of whether the accused had been convicted of a crime punishable by a term of imprisonment exceeding one year.

The Fifth Circuit in *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981), has clearly explained the two components of relevancy under Rule 401:

> The essential prerequisite of admissibility is relevance. Fed. R. Ev. 402. To be relevant, evidence must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* 401. Implicit in that definition are

two distinct requirements: (1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action. McCormick on Evidence § 185, at 435 (2d Ed. 1972); 1 Weinstein's Evidence 401[03], at 401-13 (1980); 22 Wright & Graham, Federal Practice and Procedure: Evidence § 5162, at 18 (1978). Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law. Simply stated, the proposition to be proved must be part of the hypothesis governing the case – a matter that is in issue, or probative of a matter that is in issue, in the litigation. McCormick on Evidence, *supra*, § 185, at 434; 1 Weinstein's Evidence, *supra*, ¶ 401[03].

See also, *United States v. Bagley*, 473 U.S. 667, 703 fn. 5 (1985) (Marshall, J., dissenting) ("If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." quoting E. Cleary, *McCormick on Evidence* § 185 (3d ed. 1984)). For the name and nature of the prior felony conviction to be relevant in a § 922(g)(1) prosecution, the government must establish that they are of consequence to the determination of the action.

Whether evidence is of consequence to the determination of the action (materiality) depends on "the elements of the offenses charged and the relevant defenses (if any) raised to defeat criminal liability." *Hall*, 653 at 1005, citing 1 *Weinstein's Evidence*, ¶ 401[03], at 401-11 (1980). The matter in controversy or element in issue in a § 922(g)(1) case is whether the accused previously had been convicted of a crime punishable by a term of

imprisonment exceeding one year. The statute does not specify that a particular kind of offense is required to prove guilt. The name and nature of the prior conviction are simply not of consequence to a determination of this element. The name and nature of the prior conviction are thus immaterial and, therefore, irrelevant. *See* Petitioner's Opening Brief at 10-15.

The government contends that the name and nature of a prior conviction are relevant because some prior convictions are excludable from § 922(g)(1) by 18 U.S.C. § 921(a)(20). However, Old Chief's prior felony assault conviction is not excludable by § 921(a)(20). Furthermore, as the government establishes, whether a particular conviction is excluded by § 921(a)(20) is a question of law and is a decision to be made by the trial judge. Brief for the United States at 20 fn. 12; *See also, United States v. Grinkiewicz*, 873 F.2d 253, 258 (11th Cir. 1989). More importantly, the trial court in Old Chief's case instructed the jury, as a matter of law, that his predicate felony is a crime punishable by imprisonment for a term exceeding one year:

> With respect to the first element set forth above, I instruct you that the offense of Assault Resulting in Serious Bodily Injury is a crime in the federal courts of the United States punishable by imprisonment for more than one year.

J.A. 34. With this instruction, the only remaining question was whether Old Chief had been convicted of said offense – an issue which Old Chief could not disprove and which he conceded. Thus, with a minor change in the instruction given, the trial court could easily have eliminated the prejudice to Old Chief by excluding from the

instructions any reference to the name and nature of the prior assault conviction. The following instruction would have eliminated unfair prejudice and would not have impeded the government's case at all:

> With respect to the first element set forth above, I instruct you that the Defendant, Johnny Lynn Old Chief, has been convicted of a crime in the federal courts of the United States punishable by imprisonment for more than one year.

This, of course, would not have eliminated all prejudice because, having denied Old Chief's motion in limine, the trial court allowed the prosecutor to tell the jury that Old Chief had been convicted of a prior assault.

In sum, evidence of the name and nature of Old Chief's prior conviction was neither necessary, material, strictly in terms of Rule 401, nor relevant.

B. The Rule Adopted by the First Circuit in *Tavares* does not Prevent the Government from Making a Full Presentation of Proof of the Crime of Felon in Possession of a Firearm

Having failed to explain why evidence of the nature of the prior felony conviction was material or necessary in Old Chief's case, or why such evidence is material or necessary in any § 922(g)(1) case, the government raises the alarm that a ruling by this Court in favor of Old Chief "would allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense, leaving juries to resolve abstract, isolated questions, rather than the defendant's innocence or guilt." Brief for the United States at 23. Despite its best efforts to

demonstrate that a rule eliminating evidence of the nature of a prior conviction in a § 922(g)(1) case would be the end of the world for government prosecutors,[1] a careful review of the rule proposed by Old Chief, as adopted and explained by the First Circuit in *United States v. Tavares*, 21 F.3d 1, 3-6 (1st Cir. 1994) (*en banc*), allays this parade of horribles to the level of the boy who cried wolf. The rule in no way leads to the result suggested by the government.

The *Tavares* court articulated the rule as follows: the government is required to accept a defendant's stipulation as to the defendant's status as a felon in a § 922(g)(1) prosecution and is prohibited from introducing evidence about the nature of the prior felony unless the trial court finds that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice. 21 F.3d at 5. This rule would not limit the government from presenting the name, nature and details of a prior felony conviction when such information has "relevance independent of simply proving prior felony status * * * " such as when such evidence is admissible under Rule 404(b) or Rule 609. *United States v. Wacker*, 72 F.3d

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[1] "[A] cold stipulation can deprive [the government] of the legitimate moral force of [its] evidence" (Brief for the United States at 24); it would "impair the effectiveness of the prosecution's case" (*Ibid.*); it would leave "the jury to resolve a seemingly abstract proposition" (*Id.* at 25); " * * * a naked admission might * * * rob the evidence of much of its fair and legitimate weight" (*Id.* at 24); it would "lead to substantial jury confusion in a wide variety of criminal prosecutions" (*Id.* at 26); and would allow a defendant to "require the government to stipulate to [a defendant's] intent * * * " (*Ibid.*).

1453, 1473 (10th Cir. 1995). In adopting the rule from *Tavares*, the Tenth Circuit recognized that, under the rule, "* * * the prosecution retains broad discretion to introduce the underlying circumstances of a crime when those circumstances are truly relevant to the prosecution of the case." (*Ibid.*)

The narrow scope of the *Tavares* rule precludes it from being applied to any situations outside the status as a felon element in § 922(g)(1) cases. Unless the 403 balancing test is met, that is, unless the probative value of evidence is substantially outweighed by the danger of unfair prejudice, the government is not restricted from introducing evidence of the intent (*mens rea*) or actions of defendant (*actus reus*). The rule does not restrict the application of Rules 404(b) and 609. As stated by the First Circuit, the right of the government to present a full picture of the offense is "in no fashion weakened by requiring a stipulation to establish the defendant's status as a felon * * * [t]he predicate crime is significant only to demonstrate status, and a full picture of that offense is, even if not prejudicial, beside the point." 21 F.3d at 4. Finally, the prosecution cannot "ordinarily" be forced to accept a stipulation if it "prefers to introduce a judgment of conviction properly redacted." *Id.* at 5.

C. Although the Prosecutor Did Not Present the Nature of Old Chief's Prior Assault Conviction in an Inflammatory Manner, the Prosecutor's Soft Sell Approach Nonetheless Created Undue Prejudice

The government suggests that presenting evidence of the nature of Old Chief's prior felony was minimally prejudicial because its offer "was not inflammatory and did not reveal the facts underlying the prior offense." Brief for the United States at 30-31. At the same time, the government admits that "[a]dmission of evidence of the prior assault conviction presented the potential that the jury might improperly surmise that, having committed assault in the past, petitioner was more likely to have done so again." *Id.* at 30. The government cannot escape the similarities between the two offenses. The prior conviction was for assault resulting in serious bodily injury; the current charge was assault with a dangerous weapon. The prior conviction was relatively recent, having occurred in the same federal court in 1989.

The prosecutor did not need more for the jury to make improper use of the nature and name of Old Chief's prior conviction. Even if it was a "soft sell," it was an effective one. The jury was repeatedly reminded of the prior felony assault throughout the trial.[2] Compare,

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[2] The government argues that the defense somehow waived the right to argue that the trial court should have considered remedies other than stipulation because Old Chief did not move to redact the judgment of conviction. Brief for the United States at 33. However, once the trial court denied the motion in limine, thereby allowing statements, testimony and

United States v. Jones, 67 F.3d 320, 324 (D.C. Cir. 1995). ("[A]lthough the district court gave limiting instructions, the nature of the prior felony was repeatedly brought to the jury's attention by the judge and the prosecutor.") The obvious did not need to be stated: If you have any doubt about whether Old Chief assaulted Anthony Calf Looking with this gun, well, you know he has assaulted other(s) before – if he did it before, he must have done it again.

Finally, the government points out how fair and just it was because it "introduced evidence of only one prior conviction." Brief of the United States at 31. Was it mere coincidence that the one prior conviction selected by the government was highly similar in nature to the new assault count? The United States exalts form over substance!

This Court must read between the lines of the government's brief. There is nothing there which in any way justifies introducing evidence of the nature of Old Chief's prior conviction. The refusal to stipulate revealed that the prosecution believed the judgment and conviction had prejudicial value, and it rendered nonexistent any otherwise legitimate interest the government might have had in wanting the jury to know about Old Chief's prior assault. *See* Petitioner's Opening Brief at 43.

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evidence of Old Chief's prior assault, a mere redaction of the judgment of conviction would not have prevented the jury from learning of the prior assault. It was mentioned at least five separate times during the trial including twice in the jury instructions which were both read, and submitted in writing, to the jury. Petitioner's Opening Brief at 5-6.

III. CONCLUSION

For the foregoing reasons, and those stated in our Opening Brief, the judgment of the United States Court of Appeals for the Ninth Circuit must be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted,

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